IN THE
MISSOURI SUPREME COURT

SC85675

STATE ex rel. OSCAR LACANO
and
WCP PATHOLOGY, INC.,

Relators,

vs.

THE HONORABLE MARK D. SEIGEL,

Respondent.

ORIGINAL PROCEEDING IN PROHIBITION

ON PRELIMINARY RULE IN PROHIBITION FROM THE SUPREME COURT
OF MISSOURI TO THE HONORABLE MARK D. SEIGEL,
CIRCUIT JUDGE, ST. LOUIS COUNTY CIRCUIT COURT

RESPONDENT'S BRIEF

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The Honorable Mark D. Seigel

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JURISDICTIONAL STATEMENT

Respondent adopts and incorporates Relators' Jurisdictional Statement.

STATEMENT OF FACTS

Respondent adopts and incorporates Relators' Statement of Facts.

POINTS RELIED ON

I. RELATORS ARE NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY FURTHER ACTION OTHER THAN DISMISSING PLAINTIFFS' MEDICAL MALPRACTICE ACTION, BECAUSE THE MALPRACTICE ACTION IS NOT BARRED BY THE TWO-YEAR STATUTE OF LIMITATIONS UNDER SECTION 516.105, R.S.Mo., IN THAT

A. THE GENERAL STATUTE OF LIMITATIONS IN 516.105 BEGINS TO RUN ON THE DATE OF THE ALLEGED NEGLIGENCE BUT IS TOLLED TO THE DATE OF DISCOVERY IN A NEGLIGENT FAILURE TO INFORM CASE.

B. THE DATE OF NEGLIGENCE PLEADED BY PLAINTIFFS, WHICH PREDATED FILING SUIT BY ALMOST FOUR YEARS, IS IRRELEVANT BECAUSE PLAINTIFFS DID NOT DISCOVER THE NEGLIGENT FAILURE TO INFORM THE RESULTS OF A MEDICAL TEST UNTIL LESS THAN TWO YEARS FROM THE DATE THE MALPRACTICE PETITION WAS FILED; AND

C. UNDER SECTION 516.105(2), THE NEGLIGENT FAILURE TO INFORM EXCEPTION TO THE GENERAL TWO-YEAR STATUTE OF LIMITATIONS FOR MEDICAL MALPRACTICE ACTIONS IS APPLICABLE BECAUSE THE EXCEPTION BY ITS PLAIN LANGUAGE ENCOMPASSES THE SITUATION PRESENTED IN THIS CASE WHERE A PATIENT IS INFORMED OF ERRONEOUS MEDICAL TEST RESULTS ONLY TO FIND OUT LATER THE TRUE TEST RESULTS.

Butler v. Mitchell-Hugeback, Inc., *895 S.W.2d 15 (Mo.banc 1995)*

Green v. Washington Univ. Med. Ctr., *761 S.W.2d 688 (Mo.App.E.D. 1988)*

Derfelt v. Yocum, *692 S.W.2d 300 (Mo.banc 1985)*

§ 516.105, R.S.Mo. (2000)

§ 516.105(2), R.S.Mo. (2000)

II. RELATORS ARE NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY FURTHER ACTION OTHER THAN DISMISSING PLAINTIFFS' MEDICAL MALPRACTICE ACTION, BECAUSE THE MALPRACTICE ACTION IS NOT BARRED BY THE TWO-YEAR STATUTE OF LIMITATIONS UNDER SECTION 516.105, R.S.Mo., IN THAT THE FAILURE TO INFORM PLAINTIFFS OF THE TRUE MEDICAL TEST RESULTS IS COVERED BY THE FAILURE TO INFORM EXCEPTION SET FORTH IN SECTION 516.105(2), EXTENDING THIS EXCEPTION TO CASES WHERE ERRONEOUS TEST RESULTS ARE COMMUNICATED TO A PATIENT WOULD

ONLY REFLECT AN ACCURATE APPLICATION OF THE PLAIN AND ORDINARY MEANING OF THE EXCEPTION, AND THIS EXCEPTION AS SO CONSTRUED WOULD NOT RUN AFOUL OF MISSOURI PUBLIC POLICY BECAUSE IT WOULD ONLY BE A LIMITED "DISCOVERY RULE" AS PER THE TERMS OF THE STATUTORY PROVISION AND WOULD NOT OPERATE AS A BLANKET "DISCOVERY RULE."

18 M.L.W. 433

ARGUMENT[1]

I. RELATORS ARE NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY FURTHER ACTION OTHER THAN DISMISSING PLAINTIFFS' MEDICAL MALPRACTICE ACTION, BECAUSE THE MALPRACTICE ACTION IS NOT BARRED BY THE TWO-YEAR STATUTE OF LIMITATIONS UNDER SECTION 516.105, R.S.Mo., IN THAT:

A. THE GENERAL STATUTE OF LIMITATIONS IN 516.105 BEGINS TO

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[1]Respondent's Point I argument is a direct response to Relators' point argued in their brief. Respondent's Point II argument is a direct response to the sole point argued in the brief of the Missouri Organization of Defense Lawyers as *amicus curiae.*

RUN ON THE DATE OF THE ALLEGED DISCOVERY BUT IS TOLLED TO THE DATE OF DISCOVERY IN A NEGLIGENT FAILURE TO INFORM CASE.

B. THE DATE OF NEGLIGENCE PLEADED BY PLAINTIFFS, WHICH PREDATED FILING SUIT BY ALMOST FOUR YEARS, IS IRRELEVANT BECAUSE PLAINTIFFS DID NOT DISCOVER THE NEGLIGENT FAILURE TO INFORM THE RESULTS OF A MEDICAL TEST UNTIL LESS THAN TWO YEARS FROM THE DATE THE MALPRACTICE PETITION WAS FILED; AND

C. UNDER SECTION 516.105(2), THE NEGLIGENT FAILURE TO INFORM EXCEPTION TO THE GENERAL TWO-YEAR STATUTE OF LIMITATIONS FOR MEDICAL MALPRACTICE ACTIONS IS APPLICABLE BECAUSE THE EXCEPTION BY ITS PLAIN LANGUAGE ENCOMPASSES THE SITUATION PRESENTED IN THIS CASE WHERE A PATIENT IS INFORMED OF ERRONEOUS MEDICAL TEST RESULTS ONLY TO FIND OUT LATER THE TRUE TEST RESULTS.

1. Introduction & Standard of Review

Contrary to Relators' assertion, the question presented in this prohibition proceeding is whether the § 516.105(2), R.S.Mo.[2], failure to inform exception to the general two-year

[2]Unless otherwise indicated, all references hereafter will be to the Revised Statutes

statute of limitations is applicable to a situation where a patient is erroneously informed of a test result and later discovers the true test result so as to toll the two-year statute of limitations until the date of discovery of the true and accurate test result.

The basic purpose of the remedy of prohibition is to confine an inferior court to its proper jurisdiction. ***State ex rel. McCulloch v. Shiff,*** *852 S.W.2d 392, 394 (Mo.App.E.D. 1993).* Prohibition serves to prevent a lower court from acting without or in excess of its jurisdiction. ***State ex rel. Dally v. Elliston,*** *811 S.W.2d 371, 373 (Mo.banc 1991).* A writ of prohibition is an extraordinary remedy used to correct and to prevent the exercise of extrajudicial power. ***State ex rel. Missouri-Nebraska Exp., Inc. v. Jackson,*** *876 S.W.2d 730, 733-34 (Mo.App.W.D. 1994).*

Missouri courts should employ the writ of prohibition judiciously and with great restraint. ***Derfelt v. Yocum,*** *692 S.W.2d 300, 301 (Mo.banc 1985).* The discretionary authority of this Court to issue a writ of prohibition is exercised when the facts and circumstances of the case in question unequivocally demonstrate that there exists an extreme necessity for preventive action. Absent such conditions, this Court should decline to act. ***Derfelt,*** *692 S.W.2d at 301; see also* ***Missouri Dept. of Social Services v. Administrative Hearing Com'n.,*** *826 S.W.2d 871, 873 (Mo.App.W.D. 1992).* Prohibition, however, does not issue to review discretionary trial court rulings unless they amount to an abuse of discretion so great as to be an act in excess of jurisdiction and are such as to create injury which is

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of Missouri (2000).

irremediable on appeal. ***Jones v. Corcoran,*** *625 S.W.2d 173, 174 (Mo.App.E.D. 1981).*

The Court should deny Relators' petition for a writ of prohibition in this action. The facts and circumstances of this case, viewed in their totality, plainly demonstrate the lower court acted well within its sound discretion to deny Relators' unfounded and unsupported request to have the civil suit dismissed as Plaintiffs filed suit within two years of the discovery of the true and accurate result of the medical test performed by Relators.

2. Section 516.105 Does Not Bar Plaintiffs' Action as a Matter of Law

Respondent agrees with Relators' contention that § 516.105 provides a general two-year limitation for medical malpractice actions, measuring the starting point of such a period of limitation from "the date of the occurrence of the act of neglect complained of . . . ." The statute, however, provides three exceptions to this general limitations period. Of import to this case, § 516.105(2) provides:

> In cases in which the act of negligence complained of is the negligent failure to inform the patient of the results of medical tests, the action for failure to inform shall be brought within two years of the date of the discovery of such alleged negligent failure to inform
>
> . . . . except that, no such action shall be brought for any negligent failure to inform about the results of medical tests performed more than two years before August 28, 1999 . . . .

Plaintiffs' Petition alleges a cause of action against a medical doctor and a corporation which provided health care services through the doctor. (A2, Petition, ¶ 1 – ¶ 7) Plaintiffs

additionally allege Dr. Lazcano performed the biopsy of Plaintiff Lonnie Davidson's (Davidson) lymph node and analyzed the test results from the same on November 2, 1998. (A2, Petition, ¶ 7) Specifically regarding Dr. Lazcano's negligence, Plaintiffs contend he failed to properly analyze Davidson's lymph node or that he properly analyzed the lymph node but failed to communicate the proper result of the test to Davidson's treating physicians. (A2, Petition, ¶ 8) Most importantly, Plaintiffs allege Davidson was not informed of the true and accurate test results until October 30, 2000, when he received a letter from his treating physicians, dated October 23, 2000, informing him of the true and accurate test results. (A2, Petition, ¶ 10)

Under the totality of these circumstances, Plaintiffs' cause of action is governed by § 516.105(2). The testing was conducted and analyzed by Lazcano within two years before August 28, 1999. Lonnie was not informed of the true and accurate test results until October 30, 1998. Thus, Plaintiffs cause of action accrued on October 30, 1998.

Relators argue the cause of action was barred as a matter of law by § 516.105. (Relators' Brief at 14-17) In support of this conclusion, Relators contend Plaintiffs' Petition alleged a failure by Dr. Lazcano to properly diagnose Davidson's lymph node specimen. (Relators' Brief at 15-16) Relators then rely on ***Green v. Washington Univ. Med. Ctr.,*** *761 S.W.2d 688 (Mo.App.E.D. 1988),* for the proposition that in a failure to diagnose medical malpractice case the cause of action accrues at the time of the pertinent exam or test which should have led to the proper diagnosis. ***Green,*** *761 S.W.2d at 690.* From this principle, Relators finally contend that Plaintiffs alleged Dr. Lazcano's act of negligence occurred on

November 3, 1998 — the date he took Davidson's lymph node biopsy and analyzed it. (Relators' Brief at 16) Because Plaintiffs alleged the date of negligence as November 3, 1998, Relators' conclude, their cause of action had to be filed by November 3, 2000, to meet the two-year limitations period of § 516.105. (Relators' Brief at 16-17)

This subsection of Relators' argument occurs in a vacuum without any consideration of Respondent's contention that the medical malpractice action is not time barred per § 516.105(2). This provision takes the underlying action out of the purview of the general medical malpractice statute of limitations.

Furthermore, Relators' reliance upon ***Green v. Washington Univ. Med. Ctr.,*** *761 S.W.2d 688 (Mo.App.E.D. 1988),* for the proposition that a cause of action for medical malpractice accrues on the date of the alleged negligent act or acts, is misleading. In ***Green,*** the plaintiff was examined by Dr. Terrell, an internist. As part of the exam, x-rays were taken of all portions of plaintiff's spine. Dr. Murphy read the x-rays and prepared a report. Dr. Garret interpreted plaintiff's electrocardiogram. Drs. Murphy and Garrett did not see or examine plaintiff at the time of the exam or anytime thereafter. Dr. Terrell last saw plaintiff on September 7, 1984. ***Green,*** *761 S.W.2d at 689.* Nearly three years later, on August 12, 1987, plaintiff filed suit against Washington University Medical Center and Drs. Murphy, Garrett and Terrell. Defendants moved for summary judgment, arguing in part that the case was time-barred by the two-year medical malpractice statute of limitations. The trial court granted the motion for summary judgment on the basis that the action was time barred. ***Id.***

The appellate court affirmed the trial court's judgment. In doing so, the appellate court noted that plaintiff's claims against defendants were based on "defendants' failure to diagnose a condition which existed at the time of the physical exam. The negligent act complained of therefore occurred on June 29, 1984. Plaintiff's limitation period commenced to run on June 29, 1984, at least as to his claims against Drs. Murphy and Garrett." ***Id.*** *at 690*. The court additionally noted regarding a particular argument posited by plaintiff — no cause of action accrued until there was a clinical manifestation of damage when the kidney stone descended into the ureter in February or March 1986 — that:

> This assertion approximates an espousal of the view that the limitations period should not begin to run until the tort is capable of ascertainment. Although couched in different language by plaintiff, it is tantamount to a request adopt a discovery rule in malpractice actions. Except where foreign objects are left within the patient after surgery, Missouri has rejected the adoption of a discovery rule for malpractice actions.
>
> ***Green,*** *761 S.W.2d at 690*.

Relators ignore that the ***Green*** opinion was issued prior to the adoption of the legislative amendment to § 516.105, which added subsection 2 as an exception to determining when a medical malpractice case accrues. The court's analysis of the case in ***Green*** occurred under that condition in the absence of the failure to inform exception to the general two-year limitations period. Since the adoption of that exception, it is entirely possible it would have

applied to the portion of the plaintiff's petition asserting Drs. Murphy and Garrett negligently failed to inform plaintiff of the true and accurate test results in failing to find from the tests that plaintiff had calcified kidney stones in his kidney. Plaintiff was not aware of the true and accurate results of the tests until March 1986 when a kidney stone dislodged from his kidney and obstructed his ureter and left kidney. ***Green,*** *761 S.W.2d at 689.* Plaintiff's petition was filed on August 12, 1987, within two years of the discovery of the true and accurate results of the medical tests performed. ***Id.***

Respondents agree with Relators to this extent. The date of negligence alleged in Plaintiffs' is November 3, 1998. (A2, Petition, ¶ 8) Had the legislature not adopted the failure to inform exception to the general two-year statute of limitations, Plaintiffs' action would be time barred. However, when the case is viewed in light of the total facts and circumstances, it is apparent Plaintiffs properly provided a factual pleading for medical malpractice under § 516.105(2). By filing suit within two years of the discovery of the true and accurate results of the biopsy test, Plaintiffs are not statutorily barred from bringing suit against Relators.

3. The "Failure to Inform" Exception Applies to Plaintiffs' Action The Exception by its Plain Language Encompasses the Situation Presented in this Case Where a Patient Is Informed of Erroneous Medical Test Results Only to Find out Later the True Test Results.

Respondent agrees with Relators' recitation of Missouri's general legal principles governing the application of statutes of limitations. Statutes of limitations are favorites of the

law. ***Butler v. Mitchell-Hugeback, Inc.,*** *895 S.W.2d 15, 19 (Mo.banc 1995).* Statutes of limitations cannot be avoided unless the party seeking to do so falls strictly within the claimed exception. ***Id.*** Exceptions to statutes of limitations are to be strictly construed and cannot be enlarged by the courts upon consideration of apparent hardship. ***Id***.

Respondent, however, has not ignored these principles. Section 516.105(2) does create a limited exception to the general two-year statute of limitations. This provision extends the statute of limitations in cases where "the act complained of is the *negligent* failure to inform the patient of the results of medical tests." [emphasis added] Respondent reasserts herein that this exception applies not to only to situations in which a health care provider fails to inform its patient of test results but also where a health care provider informs its patient of erroneous test results or fails to inform its patient of the proper test results.

Again, Respondent agrees with Relators' recitation of Missouri's legal principles governing the construction of Missouri statutes. (*See* Relators' Brief at 18) In addition to these principles, the Court should additionally consider its opinion issued in ***Butler v. Mitchell-Hugeback, Inc.,*** *895 S.W.2d 15 (Mo.banc 1995).* In the case, a warehouse owner, after his warehouse collapsed, brought suit against the original contractor and subcontractors who built the warehouse. The action was brought 11 years after the warehouse was built. The trial court entered summary judgment in favor of the contractor and subcontractors, ruling that the action was barred by the 10-year statute of limitations set forth in § 516.097. ***Butler,*** *895 S.W.2d at 17-19.*

This Court noted that § 516.097 established a 10-year limitation on claims for damages due to a defective or unsafe condition of an improvement on real property brought against a person whose sole connection with the improvement is in designing, planning or constructing the improvement. ***Id.*** *at 19.* However, this Court noted that per § 516.097.4(2) the 10-year limitations period did not apply if a person conceals any defect or deficiency in the design, planning or construction if that defect or deficiency directly resulted in the defective or unsafe condition for which the action was brought. ***Id.*** On appeal, the interpretation of this statutory exception to the general statute of limitations boiled down to whether the word "conceals" required scienter or culpability. ***Id.***

After declaring Missouri's general rules of statutory construction (the same as set forth in Relators' Brief), the Court further found:

> "Conceals" has several shades of meaning, ranging from "refrain from revealing" to the more active "prevent disclosure." But regardless of which shade one chooses, the word connotes something more than merely covering over or not informing. Conceal "often implies a certain design or artfulness." [] Had the legislature intended to toll the statute of limitations of § 516.097 in every case except those relatively few cases involving open or uncovered defects or where the owner was informed of the defect, it could have used those words. However, it did not. Instead, the General Assembly chose a word which carries the implication of intentional conduct designed to prevent discovery.

Butler, *895 S.W.2d at 19.*

Application of Missouri's rules of statutory construction demonstrates the plain, ordinary meaning of the terms used in § 516.105(2) demonstrates it encompasses cases where a health care provider fails to inform its patient of the proper, true, accurate results of medical testing. The word "inform" also has several shades of meaning, including "to guide or direct . . . to make known . . . to communicate knowledge to . . . to impart information or knowledge." ***Webster's Ninth New Collegiate Dictionary*** *620 (1989).* Regardless of which shade is chosen, "inform implies the imparting of knowledge *esp. of facts . . . .*" ***Id.*** *[emphasis added]* Accordingly, failure to "inform" as used in § 516.105(2) could mean the failure to communicate or impart information. This would encompass a situation such as that presented in ***Weiss v. Rojanasathit,*** *975 S.W.2d 113 (Mo.banc 1998),* where the health care provided simply failed to communicate to the patient the results of medical tests performed. ***Id.*** *at 116.*

Applying the plain and ordinary meaning of "inform," failure to "inform" as used in § 516.105(2) could equally apply to a situation such as that presented in this case where the health care provided failed to impart *facts* to Davidson.

It should also be noted that "[t]he meaning of a word must depend to some extent on the context in which it appears." ***Butler v. Mitchell-Hugeback, Inc.,*** *895 S.W.2d 15, 19 (Mo.banc 1995).* In this case, § 516.105(2) states the exception is applicable in cases where "the act of negligence complained of is the negligent failure to inform the patient of the results of medical tests . . . ." The use of "negligent" to modify failure implies that it covers situations

not only where the health care provider fails to impart any information or knowledge as to the result of a medical test, whether the result is favorable or unfavorable, as in ***Weiss,*** but also where the health care provider misinforms the patient as to test results. Relators' charge that Respondent is attempting "to engraft a 'discovery' rule to the statute of limitations in failure to diagnose cases." (Relators' Brief at 20) They additionally assert Respondent is inviting the Court "to rewrite Section 516.105 to include an 'erroneous test results' exception." (Relators' Brief at 20)

Respondent readily acknowledges that the Court and Missouri's appellate courts have repeatedly held that § 516.105 does not provide for a "discovery rule" in determining when a medical malpractice action accrues, except in cases involving foreign objects left in a patient during surgery. *See, e.g.,* ***Laughlin v. Forgrave,*** *432 S.W.2d 308, 313-14 (Mo.banc 1968);* ***Green v. Washington Univ. Med. Ctr.,*** *761 S.W.2d 688, 690 (Mo.App.E.D. 1988).*

With the addition of the failure to inform exception, the legislature has added an additional "discovery rule" exception as it dictates that an action must be filed "within two years of the date of the discovery of such alleged negligent failure to inform . . . ." § 516.105(2). It is only this limited "discovery rule" that Respondent enforced in denying Relators' motion to dismiss

the underlying malpractice action. Respondent is not petitioning the Court to create a "discovery rule" for all failure to diagnose cases. Plaintiffs' Petition does not allege failure to diagnose. Instead, Plaintiffs' contend Dr. Lazcano was negligent in failing to properly analyze Davidson's lymph node biopsy or that he properly analyzed the same but failed to communicate the proper results of the test to Davidson's treating physician. (A2, Petition, ¶ 8) Even if Plaintiffs' Petition is deemed to assert a claim for failure to diagnose, it is limited to the extent of the statutory exception — cases involving health care providers conducting medical tests.

Respondent in no way is encouraging the Court to apply § 516.105(2) to all cases involving an allegation of failure to diagnose a condition. Rather, Respondent urges the Court to apply the plain, ordinary meaning of the statutory terms chosen by the legislature. Had the legislature intended to limit this exception to cases where a health care provider completely fails to communicate the results of medical testing, good or bad, to a patient it could have so limited the provision in the language used. However, the legislature chose the word "inform" which entails the imparting of knowledge, particularly facts. This in turn implies the imparting of true, accurate and correct test results. Misinforming a patient of test results thus falls within the exception. If the provision is constricted in the manner proposed by Relators, health care providers in effect would be granted a license to behave as negligently as they wish, provided they communicate something to their patients regarding their medical testing, regardless of whether the information imparted is true or false.

4. Application of the Continuing Care Exception to the Two-Year

Statute of Limitations for Medical Malpractice Claims

Respondent cannot deny that Plaintiffs have alleged Davidson was under Dr. Lazcano's care only on November 3, 1998. (A2, Petition, ¶ 7) There are no allegations that Dr. Lazcano had any further contact with Davidson. Accordingly, Respondent cannot in good faith argue or maintain that Relators are negligent under the continuing care exception to the two-years statute of limitations for medical malpractice actions. *See* ***Montgomery v. South County Radiologists, Inc.,*** *49 S.W.3d 191, 194 (Mo.banc 2001)("[w]here a physician commits an act of negligence on one specific date, and has no other contact with the patient, the statute of limitations begins to run on that date (except for the specific exceptions in section 516.105)].*

II. RELATORS ARE NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY FURTHER ACTION OTHER THAN DISMISSING PLAINTIFFS' MEDICAL MALPRACTICE ACTION, BECAUSE THE MALPRACTICE ACTION IS NOT BARRED BY THE TWO-YEAR STATUTE OF LIMITATIONS UNDER SECTION 516.105, R.S.Mo., IN THAT THE FAILURE TO INFORM PLAINTIFFS OF THE TRUE MEDICAL TEST RESULTS IS COVERED BY THE FAILURE TO INFORM EXCEPTION SET FORTH IN SECTION 516.105(2), EXTENDING THIS EXCEPTION TO CASES WHERE ERRONEOUS TEST RESULTS ARE COMMUNICATED TO A PATIENT WOULD ONLY REFLECT AN ACCURATE APPLICATION OF THE PLAIN AND ORDINARY MEANING OF THE EXCEPTION, AND THIS EXCEPTION AS SO

CONSTRUED WOULD NOT RUN AFOUL OF MISSOURI PUBLIC POLICY BECAUSE IT WOULD ONLY BE A LIMITED "DISCOVERY RULE" AS PER THE TERMS OF THE STATUTORY PROVISION AND WOULD NOT OPERATE AS A BLANKET "DISCOVERY RULE."

In addressing the arguments set forth by the Missouri Organization of Defense Lawyers (MODL) as *amicus curiae*, Respondent relies for the most part on the argument set forth above in Point I and sees no need to reiterate it here. As submitted above, the application of § 516.105(2) depends upon its construction. Applying the plain and ordinary meaning of its terms, the provision covers situations wherein a health care provider fails to impart any knowledge or information to its patient regarding medical test results as well as situations where a health care provider misinforms its patient of medical test results. In so construing the exception, Respondent is not imploring this Court to adopt a broad, all-encompassing "discovery rule," but rather to apply the limited discovery rule contained in this subsection of the statute of limitations per the terms chosen by the legislature.

Respondent agrees with MODL as to the history of Missouri's statute of limitations regarding medical malpractice actions. Health care providers have been treated differently in Missouri than other possible tortfeasors and changes have been made to the medical malpractice statutes in an effort to make available and affordable health care services in Missouri.

Respondent disagrees however with MODL's argument set forth under the heading "Current Healthcare Crisis." It is not widely known that Missouri is "currently undergoing

significant tort reform to curtail the skyrocketing medical malpractice insurance premiums of healthcare providers." (MODL Brief at 18) Rather, it is widely known that given the change in control of the Missouri General Assembly they are continually attempting to change much of Missouri's tort-related legislation. Furthermore, House Bill No. 1304 was passed, and it is almost certain the current governor of Missouri will veto the same. ***18 M.L.W. 433.***

Additionally, MODL argues that § 516.105(2) should be restricted in application — at the expense of the plain, ordinary meaning of the terms used in the provision — in order to stem the health care crisis in Missouri and help reduce the insurance premiums health care providers pay for liability coverage. It should be noted however that any such "crisis" as it pertains to medical malpractice claims is simply nonexistent. On April 16, 2004, the Missouri Insurance Department found that fewer medical malpractice claims were filed in 2003 than in any other year since many medical malpractice laws were revised in 1986. ***18 M.L.W. 433.*** Such claims fell by 16.4 percent. Moreover, the top three physicians' insurers in Missouri all posted profits in 2003 while raising rates from 19 to 82 percent. ***Id.*** Consequently, if there is a current health care crisis in Missouri it clearly can be attributed to such insurance companies gouging tactics regarding premiums.

CONCLUSION

For the reasons set forth above, Respondent prays that this Court enter its judgment quashing the preliminary writ in prohibition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies:

1. This brief conforms with the length limitations set forth in Missouri Supreme Court Rule 84.06(b);

2. This brief was prepared using "Times New Roman" font, a proportional font, in Corel WordPerfect Version 11.0;

3. The number of words in this brief is 4,753; and

4. The disk served with the requisite number of briefs on this Court and the disk served with the requisite number of briefs to Respondents' attorney have been scanned for viruses and are virus-free.

_____

Daniel L. Mohs

CERTIFICATE OF SERVICE

Signature below hereby certifies that two true and accurate copies of the foregoing Respondent's Brief and one copy of the brief contained on a disk were sent on this 27th day of April, 2004, via the United States Postal Service, first-class, postage prepaid, to:

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